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No. 479

IN THE

Supreme Court of the United States

October Term, 1963

EDWARD EARLE BECK, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

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REPLY TO THE BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

WILLIAM F. WALSH
1955 Richmond Avenue
Houston, Texas 77006
Counsel for Petitioner

Alpha Law Brief Co., 402 M & M Bldg., Houston 2

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By suggesting that petitioner should seek relief through a motion for new trial filed under Criminal Rule 33, the government would relegate petitioner's future to discretionary review by the very judge whose silence created the questions presented in this appeal—a remedy which violates the spirit, if not the letter, of the statute providing, "No judge shall hear or determine an appeal from the decision of a case or issue tried by him." (28 U.S.C. 47).

> "To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents." *Speiser v. Randall*, 357 U.S. 513, 520.

Simple courtesy to the trial judge would alone seem to dictate that he not be compelled to act as factfinder when he himself is a witness. The motion for new trial is designed to apprise the judge of facts which he did not know at the time of trial, not to draw into question his own supervision of the proceedings.

The government does not deny that the facts are correctly stated in our petition. The government does not contend that these facts, in their present posture, do not entitle petitioner to relief. Nevertheless, the government would plunge him into a "merry-go-round" of post-trial motions (Cf. *Marino v. Ragen*, 332 U.S. 561, 570), none of which may prove reasonably effective to reach the problems posed by this particular record. If petitioner accepted the prosecution's invitation to proceed under Rule 33, it would be impossible to predict the future course of this litigation with almost mathematical precision.

Since the government withheld dismissal of the charge against Janet Watkins until long after expiration of the five-day period provided for filing of ordinary motions for new trial, petitioner has already been deprived of review which is "broader in scope" than that now available under Rule 33 (*Benton v. United States*, C.A.D.C., 1951, 188 F.2d 625, 627) and is put "under a heavier burden." (*Brodie v. United States*, C.A.D.C., 1961, 295 F.2d 157, 159.

The trial judge will have virtually non-reviewable discretion in determining whether he abused his discretion by failing to mention his conference with the prosecution's star witness. *Naval v. United States*, C.A. 9, 1960, 278 F.2d 611, 614-615; *United States v. Clancy*, C.A. 7, 1960, 276 F.2d 617, 637. Although his own off-the-record conduct of the trial would be subject to scrutiny at such a hearing, his fact-finding will be invulnerable (*United States v. Johnson*, 327 U.S. 106, 111) and the Fifth Circuit will even refuse to read either the records of trial or of the post-trial hearing. *Lyles v. United States*, C.A. 5, 1960, 279 F.2d 358, 359.

The prosecution may argue—or the trial judge may hold *sua sponte*—that the evidence he withheld from petitioner was "merely cumulative or impeaching" and thus provides no basis for relief under Rule 33. *Mesarosh v. United States*, 252 U.S. 1, 9. The judge may exercise his discretion by holding that the newly-discovered evidence of his conference with Janet Watkins does not, in his own mind, "compel judicial belief" that petitioner is innocent and that a jury will recognize his innocence by aquitting him. *Apel v. United States*, C.A. 8, 1957, 247 F.2d 277.

There is even some authority to the effect that newly-discovered proof of questionable conduct of the trial is not "newly discovered evidence as that term is traditionally understood by both Bench and Bar" for the purposes of Rule 33 motions. See *United States v. Holmes*, E.D.S.C., 1960, 183 F. Supp. 361, 365.

If, as we contend, there are constitutional questions in this case, petitioner might ultimately enjoy a remedy by motion under 28 USC 2255. Any discretionary fact-finding will be performed by the same trial judge, whose

opinions will stand in the Fifth Circuit unless "clearly erroneous" (*Shelton v. United States*, C.A. 5, 1957, 246 F.2d 571) and will be "entitled to the same right and respect on appeal as is any other facts determination which it is the court's duty to make." *Kennedy v. United States*, C.A. 5, 1957, 249 F.2d 257, 258.

Some years from now, if he can prove that other modes of collateral attack have been exhausted as required by the last paragraph of 28 USC 2255, petitioner may finally secure review in another court by testing his detention through habeas corpus in the district where he is confined. He will have been confined long enough to insure that he must proceed under all of the hardships and delay attendant to pauper's applications. If his sentence has been served, habeas corpus will not lie. *Parker v. Ellis*, 362 U.S. 574.

Less than a month ago, this court noted its "broad powers of supervision" over federal proceedings and stated, "It is more appropriate, whenever possible, to correct errors reachable by the appeal rather than remit the parties to a new collateral proceeding." *Bartone v. United States*, No. 337, O. T. 1963, decided October 28, 1963.

The errors in this case can be reached through this appeal; they should be corrected before this conviction becomes final and petitioner must pursue his remedies from a prison cell.

Respectfully submitted,

WILLIAM F. WALSH
1955 Richmond Avenue
Houston, Texas 77006
Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that five copies of the above and foregoing brief were mailed to the Solicitor General, Department of Justice, Washington 25, D.C., air mail postage prepaid, this 13th day of November, 1963.

WILLIAM F. WALSH, Esq.